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Supreme Court of the United States

OCTOBER TERM, 1964

No. 427

BREWTON FASHIONS, INC.,
Petitioner,

against

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioner Brewton Fashions, Inc. respectfully prays that a writ of certiorari issue to review the decree of the United States Court of Appeals for the Fifth Circuit entered in the above entitled proceeding on May 10, 1966.

Opinion Below

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at F. 2d and is reprinted in Appendix A, *infra,* p. 1a.

Jurisdiction

The decree of the United States Court of Appeals for the Fifth Circuit was entered on May 10, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1) and 29 U.S.C. Section 160(d) and (f).

Questions Presented

1. What is the responsibility of an employer toward employees whose continued presence in the employer's plant presents a threat to the maintenance of plant discipline and safety because the vast majority of other employees in the plant are hostile to them as a result of these employees' union affiliations and activities?

2. Is a broad form National Labor Relations Board order adequate in apprising an employer of his responsibilities under the circumstances described in question one?

Statute Involved

The pertinent provisions of the National Labor Relations Act, 49 Stat. 452 as amended, 61 Stat. 140, 65 Stat. 601, 73 Stat. 525; 29 U.S.C. Sections 158 and 159 are set forth in Appendix B, *infra*, p. 21a.

Statement

This case involves a petition by petitioner Brewton Fashions, Inc. (hereinafter referred to as the "Employer") for review of a decision and order of the National Labor Relations Board and the Board's cross petition for enforcement of this order against the Employer. Although the Labor Board decision and order and the subsequent decree of the United States Court of Appeals for the Fifth Circuit concerned several charges of unfair labor practice, the sole issues upon which review is sought are (1) whether the employer discriminated against certain rank and file employees because in the language of the Fifth Circuit it "not only failed to take adequate steps to prevent" their forcible eviction from the Employer's Brew-

ton plant by their fellow employees, but also that "it actively encouraged" such eviction, and (2) whether the order concerning this aspect of the charges is appropriate. In this regard we will set forth the facts based upon the findings of the Trial Examiner, the testimony of General Counsel's witnesses whose testimony the Trial Examiner credits in its entirety and undisputed facts not at issue.

The Employer is a subsidiary of Judy Bond, Inc. Prior to January 15, 1962, Judy Bond, Inc. had negotiated for the acquisition of the plant and facilities of Brewton Manufacturing Company, Inc. in Brewton, Alabama. Early in January, the Employer had also begun bargaining with representatives of the United Garment Workers of America (hereinafter called "UGW"), the certified bargaining representative of the employees of the Brewton plant. On January 15th the purchase was concluded and title to the Brewton plant was taken by Brewton Fashions, Inc., the Employer herein, a newly formed subsidiary of Judy Bond, Inc. On that day a new collective bargaining agreement between the Employer and the UGW was signed, the terms of which had been ratified previously by the Brewton employees at a union membership meeting.

Almost immediately, the employees at the Brewton plant found themselves embroiled in the attempt of the International Ladies' Garment Workers Union (hereinafter referred to as the "ILG") to compel Judy Bond to resume its former method of doing business through independent Northeastern contractors.

Prior to the acquisition of the Brewton plant, practically all of Judy Bond blouses had been made by certain contractor firms organized by the ILG. Judy Bond's management, however, made an economic determination to change its method of doing business at the end of its

contract with the ILG. Instead of having its blouses manufactured in contractor shops, it decided to manufacture blouses in its own plant facilities. A dispute between Judy Bond and the ILG arose because the ILG objected to this change in Judy Bond's operations and attempted to force Judy Bond to return to its former method of doing business. These attempts and their outcroppings were described by the Trial Examiner in the following language:

> "It is not disputed that ILG regarded the Brewton and Birmingham operations of Judy Bond as a 'runaway shop' and took certain action designed to compel Judy Bond to agree to its demands. Such activity began at the Brewton plant the latter part of January or early February, with the distribution of leaflets at the plant entrances, and the mailing of copies of 'Justice,' the official organ of ILG, to employees of that plant. The copies of 'Justice' and the aforesaid leaflets made reference to Judy Bond as a 'runaway shop.' This activity by ILG gave rise to considerable discussion among the employees. Thus, there was extensive discussions among the employees about the claim that Judy Bond was a runaway shop which would be required to move its operations back to New York or to staff the Brewton plant with displaced employees from New York; that ILG would picket the Brewton plant; and that the Company would not install air conditioning or build the lunchroom, as it had promised when it announced the purchase of the plant. This discussion continued to a greater or lesser extent, during the entire period relevant in this proceeding (January-August 1962). Plant Manager Byrd admitted that during this period, he was fully aware of the aforementioned discussions among the employees.
>
> "To gain adherents from among the employees in the Brewton plant, ILG maintained a group of

> organizers in the area during the entire relevant period. United, which had theretofore sent a representative into Brewton about once a month, thereafter kept one or more representatives in the area at all times to counter the activities by ILG." (R. 131-133)

The Trial Examiner also summarized in footnote 20 (R. 132) some of the many nationwide actions committed by the ILG in its campaign against Judy Bond:

> "* * * ILG asked some firms making garments for Judy Bond not to do so; distributed leaflets asking consumers not to buy Judy Bond products; appealed to retailers not to handle such products; and picketed various operations of Judy Bond, including the Birmingham warehouse, where the picketing began on January 25, with signs referring to Judy Bond as a 'runaway' employer."

The inevitable tensions and disruptions which all these ILG activities could be expected to provoke were heightened by the atmosphere at the Brewton plant. For years prior to the purchase of the plant by Brewton Fashions, the employees at that plant had worked sporadically—often working only a part of the normal workweek with frequent layoffs.

With the advent of Brewton Fashions, however, it was expected that the plant would be able to stay open five days a week, fifty weeks a year. For the first time the plant employees had some reasonably secure expectations of steady employment. Needless to say, the employees were greatly cheered by their brightening employment outlook and feared and resented any attempts to jeopardize their steady employment. To these employees, the ILG's militant campaign was designed to destroy their newly found job security. As the ILG activities intensified, the

tensions and uncertainties among the Brewton employees likewise intensified until the plant reached the boiling point in the latter part of May, 1962.

On May 23, 1962, employee Fay Madden came to work wearing an ILG button—the first time such a button was worn in the plant. Immediately she became engaged in an altercation with other employees during which the pin was removed from her dress. She then went to another ILG adherent, Lynn Estes, who was wearing two ILG pins and obtained another pin which provoked a second incident resulting in the removal of the pin. Although the initial run-in occurred between Madden and employee Ann Wilson, many others, according to Madden's own testimony, surrounded the participants and shouted encouragement while others held or attempted to hold her. Later that day Estes and four other outspoken ILG adherents, Louise West, Kate Jones, Kathleen Chavers and Ruth Bell, were ejected from the plant by a large group of other rank and file employees.

On May 31st when, after a cooling-off period, the four girls had returned to work, Chavers and Jones were again forceably escorted from the plant by a large group of co-workers. On July 11th, Chavers, Jones, Bell and West, whom plant manager Byrd had returned to work on July 9th after still another cooling-off period, were once again put out of the plant by a large group of their fellow employees. On Friday, August 3rd, five employees including Ruth Johnson, Carolyn Gray, Doris Odom and Orette McCall wore ILG buttons while at work and chose to go home rather than remove the pins at Byrd's request based on the threat thus posed to plant order. On the following Monday, August 6th, the four named employees returned to work without the pins but were put out of the plant by most of the plant's employees.

An examination of the facts as appears from the testimony of the General Counsel's own witnesses indicates that the Employer and particularly plant manager Byrd was most concerned with the problem of preventing these evictions and other violence. After the May 23rd incident, Byrd, two days later, met the employees involved. He stated that while these employees (except Estes and Madden) still had their jobs, it would not be advisable for their own safety to return until feelings in the plant had quieted down. Indeed, the employees themselves acknowledged the threat to their safety by asking for police protection (A. 122-4; 166-8; 218; 264-5).

On May 30th he told West, Jones, Chavers and Bell to return to work on May 31st. When they returned he re-assigned West and Bell to sewing machine jobs. Previously, they had been service girls required to go to many other employees in order to hand out and collect work. In their new jobs, they would necessarily remain by their sewing machines without having to go to any other section of the plant. In that way he took yet another measure to minimize the frictions that would result from their walking around other sections of the plant.

Jones and Chavers, who had worked in the cutting department, a section removed from the bulk of the sewing machine operators, were returned to their former jobs. Indeed, Byrd directed their foreman, Eskridge, to personally escort the girls back through the sewing machine room to the cutting department in a further attempt to remove any possibility of an incident. Despite these precautions and Eskridge's attempt to get assistance, Jones and Chavers were forcefully ejected from the plant

by a mass of employees before they even reached their work stations.

In a conference between Byrd and these girls on June 28th, it was mutually agreed that they should return to work on July 9th following the vacation period. Indeed, while Byrd indicated that they could resume work promptly, West suggested that since the vacation period would start soon, it would be better to wait until after the end of vacations, giving passions a further opportunity to subside. In that conference, Byrd stated that he intended personally to escort each of the four employees back to their jobs (A. 109).

As agreed, the girls returned to work on July 9th, and were, in fact, personally escorted by Byrd to their work stations. While previously the return of these girls had been marked with immediate and spontaneous action by a mass of hostile employees, no such incident occurred on July 9th. Apparently, Byrd's efforts to calm the situation had been at least temporarily successful. More particularly, by personally escorting these four employees to their jobs, he clearly indicated his disapproval of the prior incidents. On July 11th after lunch and while Byrd was away from the plant, a large group of employees, without any forewarning, again forced the four girls out of the plant. On his return following that eviction, Byrd suggested once again to these employees that for their own safety they do not return to work.

On July 27th and 30th, another known ILG adherent, Carolyn Gray, was apparently threatened by her coworkers that she too would be forcefully ejected. Nevertheless, Gray and four other ILG adherents decided for the first time to wear their ILG buttons to work four days

later on Friday, August 3rd. This was done in the face of the fact that the wearing of the ILG buttons by Madden and Estes precipitated the disturbances of May 23rd and the specific threats of eviction made to Gray. Soon after they came to work with these buttons on, Byrd called the five employees into his office and told them in the interests of plant order not to wear the buttons in the plant any more. They chose not to go back to work that day rather than remove the pins.

On Monday August 6th, four of the five employees returned to work, all without union pins. After the lunch hour, while Byrd was away at a Rotary meeting, these four were also ejected from the plant by a mob of employees. On his return, Byrd ushered the ejected girls into his office and went out into the plant where he spoke to the four employees in order to get them back to work. In his talk with the four ejected employees, he advised them that they should return home as it seemed unsafe for them presently to continue work in view of the situation.

Throughout this difficult period, Byrd took a variety of other steps in a continuing effort to avoid repetition of similar incidents. On four separate occasions during this time, Byrd addressed the whole plant over the loudspeaker system, admonishing the employees not to engage in this or similar conduct, pointing out that the Company insisted that the ILG adherents be permitted to work. These same admonitions had been expressed to the employees by Mr. Marantz (referred to in the record as Morance), a Vice-President of the Company, at the Company's annual picnic. Byrd personally talked with the floor ladies and enlisted the help of the UGW, the certified bargaining agent of the employees, and indeed, the international representative as well, and was given

assurances of their cooperation. He also posted and reposted on the plant bulletin boards specific notices restating the Company's rules against violence. All this was in addition to his efforts detailed above taken to minimize frictions by allowing heated passions a time to abate, by personally bringing the employees to their place of work, by reassigning some of the employees, and by indicating the Company's disapproval of the evictions.

These measures were eminently reasonable at the time—and the basis upon which the Trial Examiner, the Board and the Fifth Circuit would hold the Company responsible is not based on these acts, but apparently on the failure of Byrd to single out from the group particular individuals and penalize them. They, however, do not suggest just which of the employees should have been punished and what the punishment should have been; nor do they take into account what effect on plant discipline and production the imposition of penalties on any of the participants would have had.

In fact, the reports given to Byrd at the time and his subsequent investigation showed that no small group of persons could be held more responsible than the bulk of employees. The testimony of General Counsel's own witnesses indicates that each incident involved a large number of participants with equal responsibility. Thus, since some forty different employees are mentioned at different places in their testimony as having participated in these incidents, discipline of any of these forty would properly have required a discipline of the others as well.

From this account certain undisputed facts emerge:

(a) The incidents in question involved virtually all of the plant's 300 employees.

(b) Plant manager Byrd and other members of the Company's management endeavored to find some way to

let the ILG adherents work peacefully at their jobs. This was done through a wide variety of means—work reassignments, short cooling off periods, escorting employees to their work stations by a foreman and eventually the plant manager, speeches to the whole plant, notices on bulletin boards, talks to individuals and groups of employees by the Company's officers at the Company picnic, and the requests by the Company of the UGW to cooperate in the prevention of further incidents.

(c) Byrd himself did not witness any of the incidents. His entire knowledge came from hearsay statements about brief, fast moving incidents involving mass action.

(d) Byrd was successful in avoiding injury to employees and damage to property. His prime concern throughout was to avoid any significant interruption of production. Even with the advantages of hindsight, no one even now can reasonably speculate as to the consequences of any other course of conduct.

(e) There is not a shred of evidence that the Employer either sanctioned or condoned the evictions or had any forewarning or knowledge that such actions would occur.

These incidents gave rise to a National Labor Relations Board complaint alleging that the foregoing constituted an unfair labor practice by the Employer against the evicted employees. The Trial Examiner who presided over the hearing on this complaint found that the Employer failed "to take reasonable measures to prevent the employees from forcing adherence of ILG out of the plant" (R. 180). Upon a review of this determination by the Labor Board, the Board held that the Employer "did not resist domination of its employment power" but rather "ratified and condoned the forcible ejection"

(R. 257). The Fifth Circuit based its affirmation on a double ground. It held that the Employer "did more than merely acquiesce or fail to act—it encouraged the activity."

The Trial Examiner recommended a broad form order prohibiting the employer from discouraging membership in ILG "by discriminatorily discharging, laying off, failing to recall or reinstate any employee, or in any other manner discriminating in any other employee regarding hiring, tenure or any other term or condition of employment" (R. 191). This order was adopted by the Labor Board (R. 259) and enforced by the Fifth Circuit without discussion of its merits or the Employer's rights under it especially with regard to any future violence at its Brewton plant.

Basis of Jurisdiction of the Federal Courts

The basis of jurisdiction of the United States Court of Appeals for the Fifth Circuit is Section 10(e) & (f) of the National Labor Relations Act, 29 U.S.C. Section 160(e) & (f).

Reasons for Granting the Writ

1. **The decision of the United States Court of Appeals for the Fifth Circuit decides an important question under the National Labor Relations Act, which has not been, but should be settled by this Court.**

2. **Neither the decision of the Fifth Circuit nor the order of the Labor Board states the requirements of law sufficiently to be of guidance to employers generally and the Employer herein in particular.**

An examination of the statement indicates that at the time the eviction incidents occurred, the Employer was

faced with a dilemna. On the one hand it could attempt to keep the evicted employees at work in its plant but at the grave risk of totally stopping all plant production and causing even violence and bloodshed. On the other hand, it could acknowledge the practical problem with which it was confronted—let a few employees go in order to continue production at its plant and insure the physical safety of all concerned. The Employer chose the second alternative and as a result has been adjudicated to be guilty of an unfair labor practice.

Yet all three opinions heretofore rendered in this case have been silent about precisely what the National Labor Relations Act obligations are of this Employer or any other employer faced with comparable circumstances. The spelling out of the responsibility of employers when faced with a group of employees who have earned the enmity of the overwhelming majority of their co-employees as a result of the group's union activity is not just an academic exercise. If the Board's order is enforced then the evicted employees will be reinstated in the Brewton plant. But the order offers no guidance to the Employer in the event that the continued tensions between the evicted employees and their co-workers again result in violence. The Employer here will be confronted with answering correctly upon penalty of being adjudicated in contempt of court such difficult questions such as:

1. What measures must it take in the event of future violence?

2. Can it suspend any of the evicted employees in order to stop violence?

3. Is there ever a point at which the employers' obligations to maintain production and insure the safety of his employees outweighs the responsibilities which the

Labor Board has found it has toward the evicted employees?

Moreover, the Employer is still bound by state common law rules. While the decisions herein would require him to stop violence in its plant, he might be able to do so only by actions which give a colorable basis for tort liability.

This case clearly illustrates the complexities and difficulties of this problem as we will discuss below. This question has been the subject of numerous decisions of both the Labor Board and the Courts of Appeals. Yet to the best of our research, this Court has not spoken on this precise subject. We submit that the uncertainties surrounding this problem should now be cleared up by a detailed treatment of this subject by this Court. The problem faced here by Brewton Fashions can happen to any other employer when faced with a union conflict that splits its employees into rival factions ready to commit violence against one another. Such an employer desiring to obey the law and yet not see its plant become a battleground for its employees would certainly benefit from the clarification resulting from a discussion of this subject by this Court. Moreover, we submit that the Employer herein is entitled to a more enlightening discussion of its obligations. The Board's order as enforced imposes a burden uncertain in extent and vague in content upon this Employer which will be enforced by the heavy sanction of a contempt of court proceeding.

The failure to clarify the Employer's obligations is in conflict with this Court's requirement that orders of administrative agencies punishable by a contempt proceeding must be "at the outset, efficiently clear and precise to avoid raising serious questions as to their meaning and application." *FTC* v. *Henry Broch & Co.*, 368 U. S. 360, 368 (1962).

It likewise violates the requirements set forth by the Fourth Circuit in *Asheville Tobacco Board of Trade* v. *FTC*, 294 F. 2d 619, 628 (4th Cir. 1961):

> "The orders of the Commission, however, must be sufficiently specific so that the trader may be definitely informed as to the extent of the prohibited area and the Courts, in subsequent proceedings, may limit their inquiry as to whether the precise prohibitions of the Commission's order have been violated."

The requirement of precision and definiteness in an order here is all the more vital, where in this case the Company on three occasions made various attempts to restore the employees to their jobs—and yet its actions are condemned as insufficient.

3. The decision of the Fifth Circuit is in conflict with the purposes of the National Labor Relations Act and the decisions of this Court.

The Board's order in effect makes any plant management the absolute guarantor of each of his employee's continued employment regardless of the circumstances. Accordingly, in the view of the Board this has become the most important obligation of plant management. Management may run the risk of bloodshed and violence; management may find its plant shut down and production stopped as a result of the tensions between its employees and its outcroppings in physical violence. Yet apparently these consequences do not outweigh the obligation somehow implied in the Labor Act to keep all unpopular employees on the job.

Such a scale of values is contrary to the whole reasonably balancing process which has been traditionally utilized in interpreting the Act. In particular, it ignores perhaps the oldest purpose of any legal system—the maintenance

of peace and order. This consideration has been specifically held by this Court to override any other considerations of the Act. Thus, in *United Automobile Workers* v. *Wisconsin Employment Relations Board,* 351 U. S. 266 (1956), this Court specifically held that a state may enjoin violence in connection with a labor dispute—the only instance where activity covered by the Labor Act may be enjoined by a state. In other words, the importance of preventing violence overrides any consideration of the allocation of power and responsibility set forth in the Labor Act.

The express purpose of both the Wagner Act and the Taft-Hartley Act is to prevent impairment of the flow of goods in commerce. (Section 1 of the National Labor Relations Act.) It would be turning the Act upon its head to justify a possible plant shutdown for no fault of the employer, and hence impairment of the flow of goods in commerce, the evil sought to be avoided by the Labor Act because of some implied duty in the Act. In other words, the means Congress used to prevent impairment of the flow of commerce becomes more important than the end of preventing the impairment of the flow of commerce. We submit that this is not what the Act says or intends. The consequences of this approach by the Trial Examiner, the Board and the Fifth Circuit would be that an employer is completely responsible for all of the acts of its rank and file employees. This is manifestly contrary to the entire spirit of the National Labor Relations Act. An employer is liable for its own acts and not for the acts of others. This Court in *Colgate-Palmolive Peet Co.* v. *N.L.R.B.,* 338 U. S. 355, 363 (1949) specifically stated this rule:

> "* * * To sustain the Board's contention would be to permit the Board under the guise of administra-

> tion to put limitations in the statute not placed there by Congress. In reality whatever interference or discrimination was present here came not from the employer, but from fellow-employees of the dischargees. Shorn of embellishment, the Board's policy makes interference and discrimination by fellow-employees an unfair labor practice of the employer."

We submit that the decision of the Fifth Circuit runs contrary to the basic purposes of the National Labor Relations Act and the decisions of this Court.

4. The decision of the Fifth Circuit is in conflict with decisions of other Courts of Appeals on the same question.

As we have indicated earlier, other Courts of Appeals have considered this problem but they have resolved it in ways completely different from that of the Labor Board and the Fifth Circuit here. To these courts the maintenance of production was more important than the necessity to keep a few unpopular employees at their jobs. Indeed, the Fifth Circuit itself in *N.L.R.B.* v. *Edinburg Citrus Association,* 147 F. 2d 353 (5th Cir. 1945) has so held. But similar incidents have arisen in other circuits.

In *N.L.R.B.* v. *P. R. Mallory & Co.,* 237 F. 2d 437 (7th Cir., 1956), an employee named Dietz, because of her adherence to a minority union, was forcibly ejected on two different occasions by a mob of her fellow employees. The decision of her employer to discharge her in the interests of plant safety was upheld by the Seventh Circuit in the following language at page 446:

> "The predicament of Dietz was caused solely by the acts and conduct of an irresponsible group of employees and it is unfortunate that they cannot be

> held responsible. What action, if any, the Company should have taken in order to escape the accusing finger of the Labor Board we do not know. The Company thought, and so did Dietz, that her personal safety was at stake. In our judgment, the course which the Company pursued was dictated by prudence and common sense and it should not be held guilty of embracing the improper and unlawful motive of the demonstrating employees, if such they had, upon proof of such a nebulous and uncertain character."

The Court further stated at page 445:

> "Much is said concerning the failure of the Company to properly investigate the purpose of the employees engaged in the work stoppages in controversy. The fact is that an investigation was made but evidently not sufficient to satisfy the Board's idea of what management should have done under the circumstances. * * * In any event, even though it be assumed that the Company did not investigate the situation as thoroughly as it might, it is not discernible how any failure in that respect can now be utilized as proof of knowledge."

Clearly, had this case been decided by the Seventh Circuit and had the *Mallory* reasoning been applied, the determination would have been different.

Likewise, the Third Circuit in two similar cases, *N.L.R.B.* v. *Wytheville Knitting Mills, Inc.*, 175 F. 2d 238 (3rd Cir. 1949) and *N.L.R.B.* v. *Spiewak*, 179 F. 2d 695 (3rd Cir. 1950), upheld the discharge of employees because their union activities, albeit unprotected union activities, made them *persona non grata* with the bulk of their fellow employees who refused to work with them. In the *Spiewak* case, the Third Circuit stated at page 700:

> "Under the circumstances we cannot uphold the Board's view that the respondents were guilty of unfair labor practice in not reinstating the six leaders. It is a reasonable inference that unless respondents had yielded to the employee pressure as they did, they would have been compelled to shut down their plant. The Act should not be construed as calling for that sort of result in the light of the particular facts of this phase of the matter."

See also *N.L.R.B.* v. *Winston Bros. Co.*, 317 F. 2d 771 (9th Cir. 1963); *N.L.R.B.* v. *Elias Bros. Big Boy, Inc.*, 325 F. 2d 360, 366 (6th Cir. 1963); *N.L.R.B.* v. *Superior Tool & Die Co.*, 309 F. 2d 692 (6th Cir. 1962); *N.L.R.B.* v. *Clearwater Finishing Co.*, 216 F. 2d 608 (4th Cir. 1954).

This split between the circuits further complicates the dilemma of an employer faced with the threat of intra-plant violence. Which circuit has correctly stated his obligations—the Fifth Circuit here or the Seventh Circuit in the *Mallory* case. Further, what if the employer's plant is in the Third Circuit, Fourth Circuit, Sixth Circuit or Ninth Circuit? It is the clear indications of the cited decisions of those circuits that they would follow the *Mallory* rule. This decision further confuses the question of what those Courts of Appeals would do. These conflicting decisions further indicate that the time has now come for the decision of this Court on this important subject.

5. The Labor Board determination is in conflict with a determination of that Board made subsequent to the determination herein.

Subsequent to the decision of the Labor Board herein it rendered another decision in *Porto Mills, Inc.*, 149

NLRB No. 122 (1964), in effect sustaining the Employer's position herein.

That decision represents an opposite conclusion of the Board in a virtually identical situation to that here. Because of the importance of that case we will set forth at length the applicable facts.

Shortly after a union began an organizational campaign, the employer therein fired a union adherent, Luz Maria Rios. The union filed an unfair labor practice charge based on this discharge and thereafter the employer and union entered into a settlement agreement approved by the NLRB whereby the employer agreed to reinstate Miss Rios and not to engage in acts of interference, restraint or coercion. Meanwhile a group of anti-union employees had organized a "comite", an organization of employees dedicated to opposition to the union. The comite distributed literature and held rallies to oppose the union in general and Miss Rios in particular. As a consequence, when Miss Rios reported to work after an absence she was met by a mob of approximately 275 employees (out of a plant of 300) who were shouting and yelling and who refused to work with Miss Rios. The plant management called in Miss Rios and asked her to take a week's vacation with pay in order to let plant tensions calm down. When Miss Rios refused the employer suspended her indefinitely. When the announcement of Miss Rios' suspension was made to the employees demonstrating outside the plant gates, their leader requested them to go to town "to celebrate their victory."

The Board sustained and adopted the Trial Examiner's findings that the employer had not committed an unfair labor practice by discharging Miss Rios. This decision, we submit, is at complete variance with the decision herein. First it completely undercuts the Board's attemp-

ted distinction of cases such as *N.L.R.B.* v. *P. R. Mallory & Co.*, 232 F. 2d 437 (7th Cir. 1956). Thus the Trial Examiner in *Porto Mills* stated:

> "If is clear, and I find, that the Company had opposed the unionization of the plant at the outset of the organizational drive. It frankly conceded at the hearing that it had knowledge of Rios' union sympathies and some of her union activities."

He also stated:

> "I further find that the Company knew of the antipathy between Rios and the antiunion group and knew that their antipathy was predicated basically on Rios' unionism. As already found, Jordon, a supervisory employee, was a participant in an antiunion demonstration in front of Rios' home at the outset of the union campaign (the night of February 21) and she had witnessed an encounter between Rios and an antiunion employee the next morning in front of the plant. Furthermore, the Company frankly conceded at the hearing that it had known (prior to June 21), that Rios was a member of the organizing committee, that friction had existed between her and the nonunion group, and that the purpose of the Comite was to fight the Union."

Thus the Board in *Porto Mills* in refusing to find an unfair labor practice did not consider the findings that the employer possessed union animus and had knowledge of the union activities of the employee in question. Similar matters, however, were considered to be the predominant factors in this case. Also, it should be noted that while in *Porto Mills*, the employer had knowledge of impending trouble by virtue of the intensive propaganda campaign of the Comite, that factor as well was given no weight.

Second, the Board in *Porto Mills* adopted the very contention that the Employer is advocating here—namely, that in considering any employer's actions when faced with mob violence directed against a particular group of employees, the employer is not "an absolute guarantor of their jobs", but rather is only obligated to take actions which are reasonable under the circumstances. Thus the trial examiner concluded:

> "As I see it, the crucial questions here are whether the Company had taken reasonable steps to protect Rios' employment and whether, as it contends, Rios was terminated because she thwarted the Company's reasonable attempts to settle the factional dispute. While, as already noted, an employer is under an obligation to assure union employees opportunity to work without interference from antiunion employees, the employer is not an absolute guarantor of their jobs under all circumstances * * *
>
> "Under all the circumstances, I find that the Company in good faith took reasonable, sufficient measures to comply with its statutory duty to protect the rights of Rios. To be sure, as counsel for General Counsel ably argues, the Company might have taken other or additional measures, including dismissals of antiunion leaders to try to bring home to the demonstrators that it meant business. But whether or not such action would have succeeded, considering the depth of the sentiment against Rios as evidenced by the excitement and mood of the howling crowd, is highly conjectural and need not, even if it could be decided. The bona fides of the Company's conduct should be tested not by hindsight but in the light of the existing situation which called for formulated judgment then and there. I cannot say that the approach utilized by the Company—to separate and calm down the opposing

combatants and then to attempt conciliation in a more propitious climate, without resulting economic detriment to Rios (who was to be paid for the week she was to take off)—was unreasonable. The only inference I can draw from Rios' obstinate refusal to accept the Company's approach—particularly in the light of a record which shows extended absences on her part—is that she was more concerned with emotional self-gratification than with the security of her job. An employer, too, has rights, including the right to operate his business. In the final analysis, the 'ultimate problem is the balancing of the conflicting legitimate interests'. (*The Kroger Company,* 145 NLRB No. 26, quoting from *N.L.R.B.* v. *Truck Drivers Local 449,* 353 U. S. 87, 96.)—in this case the undisputed right of union employees to work without interference from nonunion employees and the right of the employer to conduct business.

"For all of the foregoing reasons, I find that the records as a whole does not support a finding that the Company failed to take reasonable steps to protect the reinstatement and continued employment of Rios from interference and coercion by the Comite and the antiunion employees; or that the Company was party to or unlawfully yielded to their pressures to oust Rios from its plant. Here, as in the *The Cross Company,* supra, before the Company 'may be held legally accountable for conduct not engaged in by its agents and not shown to have been authorized, approved, inspired, or encouraged by it, it was incumbent on General Counsel to prove more than was proved in the instant case'."

Third, the Board in *Porto Mills* considered the conduct of the alleged discriminatees in order to determine the Employer's liability, a consideration completely ignored

in this case. Thus the Board held that Miss Rios' discharge was valid because it was for her refusal to agree to the Employer's reasonable request to take a week's vacation with pay. Similarly, the Board here should have considered the unreasonable conduct of the alleged discriminatees in provoking the incident. When six ILG adherents wore an ILG button to work after the three previous incidents, their conduct was surely as unreasonable and as provocative as that of Miss Rios. In both cases the alleged discriminatees "were more concerned with emotional self-gratification than with the security of (their jobs)." If these employees were concerned about protecting their jobs and exercising rights of organization on a peaceful and non-inflammatory basis there were many other ways by which they might have accomplished these ends other than conduct so clearly likely to incur the wrath of the other plant employees.

Accordingly, we submit that *Porto Mills* is indistinguishable from this case. The confusion has been further compounded. An employer now must not only guess which rule his circuit will follow, but which precedent, this case or the *Porto Mills* decision, the Labor Board will follow. This Court by granting petitioner's petition for a writ of certiorari can help dispel this confusion.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 21054

BREWTON FASHIONS, INC.,
Petitioner,

versus

NATIONAL LABOR RELATIONS BOARD,
Respondent.

No. 21144

UNITED GARMENT WORKERS OF AMERICA, LOCAL UNION No. 422,
Petitioner,

versus

NATIONAL LABOR RELATIONS BOARD,
Respondent.

No. 21150

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

versus

UNITED GARMENT WORKERS OF AMERICA, LOCAL UNION No. 422,
Respondent.

Appendix A

Petitions for Review and Enforcement of an Order of the National Labor Relations Board, sitting at Washington, D.C.

(May 10, 1966.)

Before JONES and THORNBERRY, Circuit Judges, and SLOAN, District Judge.

THORNBERRY, Circuit Judge: Petitioners Brewton Fashions, Inc (the Company) and United Garment Workers of America, Local Union No. 422 (the UGW) seek review of the decision and order of the National Labor Relations Board. The Board has filed a cross-petition requesting enforcement of its order.

The Company is a subsidiary of Judy Bond, Inc., a corporation which sells blouses. Prior to 1962, practically all of the Judy Bond blouses had been made by certain contractor firms in New York organized by the International Ladies Garment Workers' Union (the ILG) under a master contract with the National Association of Blouse Manufacturers, of which Judy Bond was a member. In the fall of 1961, Judy Bond resigned from the Association and began dealing with the ILG separately. A labor dispute resulted when the parties could not agree.

On December 14, 1961, the Company was formed as a subsidiary of Judy Bond to manufacture blouses and contracted to purchase Brewton Manufacturing Co., Inc., which had been engaged in the production of men's shirts

at Brewton, Alabama. Since warehouse facilities were unavailable at that time in Brewton, the Company leased a building in Birmingham for a period of one year.

The UGW had been the certified bargaining representative of the employees of Brewton Manufacturing Co. since 1957. The Company negotiated a new contract with the UGW on January 10-11, 1962, recognizing the UGW as sole bargaining agent of "all employees in the plant in Brewton, Alabama, and in the temporary warehouse at Birmingham, Alabama . . ." except maintenance and supervisory employees.

The ILG objected to Judy Bond's change in operation. As described by the trial examiner:

> "It is not disputed that ILG regarded the Brewton and Birmingham operation of Judy Bond as a 'runaway shop' and took certain action designed to compel Judy Bond to agree to its demands. Such activity began at the Brewton plant the latter part of January or early February, with the distribution of leaflets at the plant entrances, and the mailing of copies of 'Justice,' the official organ of ILG, to employees of that plant. . . . This activity by ILG gave rise to considerable discussion among the employees. Thus, there was extensive discussions among the employees about the claim that Judy Bond was a runaway shop which would be required to move its operations back to New York, or to staff the Brewton plant with displaced employees from New York; that ILG would picket the Brewton plant; and that the Company would not install air conditioning or build the lunchroom, as it had promised when it announced the purchase of the plant . . .
>
> "To gain adherents from among the employees in the Brewton plant, ILG maintained a group of

organizers in the area during the entire relevant period. United (UGW), which had theretofore sent a representative into Brewton about once a month, thereafter kept one or more representatives in the area at all times to counter the activities by ILG."

The contract between the Company and the UGW was ratified by the employees in Brewton but not by the warehouse employees in Birmingham. The warehouse was a new facility and had not been served by the UGW. The Board found violations of sections 8(a)(1) and (2) in the Company's recognition of the UGW as the exclusive bargaining representative of the employees at the Birmingham warehouse at a time when the UGW did not represent a majority of the employees and in the coercion of employees to accept the UGW as their bargaining representative.[1] The Company does not contest these findings on the merits; however, it asserts that the remedy and the order concerning the Birmingham facility are improper since the matter is now moot and since the order

1. On January 3, 1962, (before negotiation on the new contract), the warehouse manager Kalamus called the eight warehouse employees into his office, introduced Mattie Jones, the UGW representative, and left the office. She explained the contract (apparently the old one with the Company's predecessor), told them that they were covered by the contract and asked them to sign dues deduction authorization cards. James Wyne refused to sign and left the room. Kalamus told him that if he did not join the union, "we can't keep you." Wyne returned to the room and told Mrs. Jones that "I didn't change my mind. Kalamus changed it for me," and signed a card. Kalamus later selected one employee to be in charge of signing up new employees for UGW and told him that if any refused he would straighten them out since he wanted all of the employees to be in the union. The ILG began picketing the warehouse on January 24, 1962, and was joined by all the employees. The warehouse was operated until December 14, 1962, apparently with replacements and then closed permanently.

is not limited to the plant at which the practice occurred. Under the facts of this case and after a reading of the order, we conclude that these contentions are without merit. *Cf. NLRB* v. *Mexia Textile Mills,* 1950, 339 U. S. 563, 567, 70 S. Ct. 826, 828-29, 94 L.Ed. 1067, . . .

Supervisors

Before dealing with the principal issues of this case, we must first consider a preliminary question of whether certain employees should be classified as supervisors under the Act.[2] The Brewton plant has some 300 employees. James Byrd is the plant manager. Forelady Oleen Turner directs the laundry room's 55 employees, and Foreman Tommy Williams is in charge of 200 employees in the sewing room. The Company admits that these employees are supervisors. Foreman O. T. Eskridge supervises twelve employees in the cutting room. He has the authority to assign work and overtime and to move employees from one operation to another within his department, and he attends meetings of supervisory personnel. The sewing department has several sections, each with a floorlady in charge. The floorladies train new employees, give out work to the operators, assign them to specific machines, check garments for quality and workmanship, return defective work to the operators for re-

2. 29 U.S.C. § 152(11):

The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

pair, assign repair work to certain operators on an hourly rate rather than the normal piecework basis and prepare production reports on each employee under them. There is evidence that they may grant time off on their own responsibility. They see that their operators do their work and that they do not spend too much time in the restroom or talking. Floorladies are paid on an hourly rate designed to yield more than production work, do not operate machines, and attend production meetings. They assist Foreman Williams in enforcing Company rules. Williams testified that he gives weight to their recommendations concerning employees under their supervision.

The Board found that Foreman Eskridge and the floorladies are supervisors within the definition provided by the Act. The evidence shows that they have authority "responsibly to direct" employees under their supervision and "effectively to recommend" action to be taken with regard to such employees. Since their exercise of authority is more than of a "merely routine or clerical nature" and "requires the use of independent judgment," they were correctly found to be supervisors under the Act. See *NLRB* v. *Southern Airways Co.*, 5th Cir. 1961, 290 F. 2d 519; *NLRB* v. *Mt. Clemens Metal Prods. Co.*, 6th Cir. 1961, 287 F. 2d 790.

Interrogation of Employees

On January 12, 1961, Plant Manager Byrd assembled the employees and informed them that Judy Bond had purchased the plant. The employees later approved the new contract with the Company by a virtually unanimous vote.

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The Brewton plant continued to be governed by rules promulgated prior to the take-over by the Company. Among others, these rules prohibited organizational solicitation "on the Company's time during working hours," assault or threat of assault on fellow employees, loafing or unnecessary slowing down of work, and "wilfully discouraging new employees with the intent and purpose of having them leave the employ of the Company."[3]

3. Byrd became manager of the Brewton plant in September 1961. On October 11, 1961, he posted on the plant bulletin board a list of plant rules and the discipline to be imposed for violation of each rule. This list of rules, which remained posted during the entire period relevant here, set forth, *inter alia*, the following:

Notice is given to each employee of the adoption by the Company of the following plant rules. The Company requests compliance with these rules and gives notice to each employee that they will be strictly and justly enforced.

Rule No.	Prohibition	Discipline
1.	Employees shall not solicit membership or engage in organizational activities or any other activities of any organization on the company's time during working hours.	Three slip system shall apply.
	* * *	
3.	Assault of fellow employees, brawling or fighting on Company property, or any act or threat thereof. All parties entering into these acts shall receive the same punishment.	Minimum of 2 weeks' layoff to discharge for employees involved.
	* * *	
14.	Loafing or unnecessary slowing down of work by any employee while on the job.	Three slip system shall apply.

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In the early part of February, Louise West was discussing the UGW and the ILG with a group of employees at lunch. Soon after lunch, she was called to Byrd's office and was told that he "would not have discussion about the Union in the plant at any time." Later that day, West notified the UGW that she wished to resign from the union. On May 7, West signed an ILG card. Several days later, Byrd called her into his office, accused her of passing out ILG literature in the plant and warned her "if I catch you or hear of you talking about this any more in this plant, you will be terminated."

Byrd called employee Kate Jones to his office in early February and told her of rumors that she was working with the ILG. She denied it. On May 15, she signed an ILG card. The following day, Foreman Eskridge asked her if she had had "company last night," and she admitted that ILG representatives had visited her. About an hour later she was summoned to Byrd's office and informed of rumors that she was aiding the ILG.

In mid-April employee Ruth Bell told Byrd that she had heard rumors that the other women were going to put her out of the plant because she had withdrawn from the UGW. Byrd told her not to worry and asked if she knew anyone who had been talking to ILG representatives and specifically about Louise West and Kate Jones. He told

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15.	Wilfully discouraging new employees with the intent and purpose of having them leave the employ of the Company.	Discharge.

* * *

The above rules, so long as they are in effect, will be enforced by the Company, and any employee violating any of the rules will be subject to the penalties as stated above.

that he was planning to make her a supervisor and had referred to the ILG because he hoped she would not get involved since it would only mean trouble. Bell signed an ILG card on May 5. The next morning Floorlady Gandy asked if ILG representatives had seen her the preceding night, saying that Byrd suspected this and wanted to know for sure, and asked her if Foreman Eskridge was involved with the ILG. Four days later Byrd told Bell that he had heard she had been soliciting during working hours and that she would be discharged if he caught her doing so on company time or property.

Employees Kathleen Chavers, Lynn Estes, Orette McCall, Ruth Johnson and Fay Madden were similarly interrogated by Byrd or other supervisory personnel before and after signing ILG cards. Byrd told Estes that bringing a copy of the ILG newspaper into the plant was a form of soliciting and that he could not carry a copy in his pocket. Byrd asked McCall if she preferred working five days a week rather than three or four and told her that if the new union came in, the Company would have to take the work back to New York.

The Board found these conversations to be violative of section 8(a)(1) of the Act. The evidence of threats of reprisal, promise of reward, close surveillance of employee activity outside the plant and attempts to induce employees to inform on their fellow employees is more than adequate to uphold these findings of the Board. *N.L.R.B.* v. *Great Atl. & Pac. Tea Co.*, 5th Cir. 1965, 346 F.2d 936, 938; *N.L.R.B.* v. *Camco, Inc.*, 5th Cir. 1965, 340 F.2d 803, 804-07 & n.6.

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Eviction of ILG Supporters

On May 22, the rule against solicitation was changed from the former prohibition against such activity "on the Company's time during working hours" to one prohibiting solicitation at any time on Company's property.[4]

Fay Madden and Lynn Estes reported to work on May 23 wearing ILG pins. While other employees held Madden, Ann Wilson took her pin and threw it away. Madden got another, and Ann Wilson tore it from her dress. Foreman Eskridge and Floorlady Gandy observed this incident but did nothing. Byrd told Madden that she "didn't have any right to wear that button" in the plant and sent her home so the other women could cool off. No action was taken against Ann Wilson or any of the other women involved. Madden was told she could return that afternoon. A little later Byrd called Estes in, told him that wearing a pin was a form of solicitation and that if he wore it again he would be fired.

After these incidents, Millard Rothenberg, Vice President of Judy Bond, spoke to the employees over the public address system. He told them that the ILG "does not belong here and we will not tolerate any action which might create dissension and disturbances in this plant. We are very gratified by the loyalty most of you have shown to the Company and we hope that this relationship will continue for a long, long time."[5]

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4. At *no time* shall anyone be permitted to solicit membership or engage in organizational activities or any other activities of any organization on the Company's property. (Emphasis in original.)

5. Address Made by Millard Rothenberg in Brewton Plant May 23, 1962

This is Millard Rothenberg speaking—I would like you to know how pleased we are with the progress you have made. Both your

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Later that afternoon, Frank Braddick picked up an iron bar, told Estes that "you are going to get hell out of here and you won't come back if you know what's good for you" and, with the assistance of four other employees, marched Estes out of the plant. At the same time a group of women forced Louise West, Kate Jones, Ruth Bell and Kathleen Chavers out of the plant. Among these women were Mary Braddick (Frank's wife), Ann Wilson and Bessie West. Just before this activity, Floorlady Gandy told Floorladies Johns and Smith to come with her to Foreman Williams' office. During the eviction, Floorlady Gandy peeked out the door and "giggled."

The four evicted women went to Byrd, told him of their expulsion and of those responsible and asked him to make the other employees leave them alone. He replied, "No, I can't handle them . . . that's what you call a mob . . . . [Y]ou can come back if you want to (tomorrow), but it will be at your own risk because I'm not going to

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production and quality levels have shown steady increases. We are positive that within the next few months your earnings will reach a higher level and that the plant will become profitable for Judy Bond.

We are going to make this plant a place that you, the Company and the city of Brewton can be proud of. We are happy to announce that the entire plant will be air conditioned within 30 to 60 days. In addition, the lighting in the plant will be doubled and the lunchroom should be completed very shortly. We expect that within four months our new distribution center will be completed and in operation.

In case there is any doubt in any of your minds, Judy Bond is here to stay. We intend to carry out all of the provisions or our three year contract and expect that you will do the same. We have no intention of permitting the I.L.G.W.U. to interfere illegally with our agreement. The I.L.G.W.U. does not belong here and we will not tolerate any action which might create dissension and disturbances in this plant.

We are very gratified by the loyalty most of you have shown to the Company and we hope that this relationship will continue for a long, long time.

give you any kind of protection in the plant; I can't." They were advised to go home and stay there until he notified them to return.

The next day the group was advised not to come to work. On the following day, they all came to Byrd's office. Byrd said he could offer them "no protection unless there is violence in the mill. . . ." Estes and Madden were told to stay after the others left. Estes was discharged for wearing a pin on the afternoon of May 23 after he had been warned not to do so. Estes denied wearing the pin. Madden was given her third slip for failing to meet production and was discharged.

On May 30 a notice was posted advising employees that there was to be no violence on Company property. Later that day West, Bell, Jones and Chavers went to Byrd's office seeking to return to work.[6] Foreman Eskridge attempted to escort Jones and Chavers to their jobs, but some 25 women forced them out the door. Mary Braddick and Ann Wilson were among these women. Eskridge returned to Byrd's office and informed him that "they are running Kate [Jones] and Kathleen [Chavers] out again and Mary Alice Braddick started every darn bit of it." All four women then left the plant after Byrd sent the other employees back to work. No action was taken against any of the employees involved in the expulsion; however, Mary Braddick was later promoted to floorlady and her husband Frank elevated to a cutter.

On June 4 the women wrote Byrd, expressing a desire to return to work. Byrd did not answer until June 25.

6. Byrd said West and Bell would be assigned to sewing machines instead of their former work as service girls since that would give them less contact with other employees. Both protested but were told that they would be discharged unless they took the new positions.

West and Bell were informed that they had "intentionally and wilfully provoked" the demonstrations which had been directed against them and that if they wished to work, they would have "to avoid the inciting of any further demonstrations." After consultation, it was agreed that they could return on July 9, following the end of a plant vacation. There was no trouble on July 9 and 10, but on July 11 the women were again driven out of the plant by a group apparently led by Louise Lundi. Eskridge took Bell, Jones and Chavers to Byrd and told him that they "had not done anything to cause the difficulty." Byrd asked for names of those responsible and told the women to stay home until he notified them. None of the women were ever notified by Byrd.

On Friday, July 27, a group of employees, including Ann Wilson, Louise Lundi and Bessie West, told Carolyn Grey that unless she gave them her ILG card she could not come to work the following Monday. Monday, Grey refused to give up her card but Lundi and Wilson decided to give her a little more time. Grey complained, and Byrd assured her that she would not be put out.

On August 3, Grey, Orette McCall, Doris Odum and Ruth Johnson came to work wearing ILG pins. Byrd called them in and said they could not wear the pins. They went home but returned the next working day to go to work. Byrd told them not to wear pins and promised to talk to the floorladies to get them to protect them. That afternoon a group of women, among whom were Louise Lundi, Ann Wilson and Bessie West, ran them out of the plant while the floorladies looked on "snickering." Byrd told them that their presence was causing the disturbance and that he could not fire 300 people for their protection.

Byrd never informed any of them that they could return to work.

On behalf of the Company, Byrd testified that he had made a thorough investigation of each of the incidents but was never able to isolate the responsible individuals and therefore could take no disciplinary action other than a group reprimand. Of the seven employees called by the Company, five of whom Byrd claimed to have interrogated, six testified that neither Byrd nor any other supervisory personnel ever questioned them about the incidents or reprimanded them for participating. Byrd also testified that production dropped about 40 percent below normal during the period of disturbance. The hearing examiner, however, noted that this testimony was in direct conflict with the statement of Rothenberg in his May 23 speech to the plant employees commending them on the "steady increases" shown in "production and quality levels."[7] Although the examiner warned the Company that it was "taking certain risks" by failing to substantiate its claims by offering the production records as evidence, the Company did not do so. The examiner concluded that there had been no substantial effect on production.

The Board found the Company's acquiescence in the expulsion of employees belonging to the ILG by members of the UGW to be a violation of 8(a)(3). The Examiner went somewhat further in concluding that "the Act imposes an affirmative duty upon an employer to insure that his obligation to maintain discipline in the plant and to provide his employees with the opportunity to work without interference from their coworkers, is not delegated

7. See note 5, supra.

or surrendered to any union or antiunion group. . . ." We do not have to go this far for the evidence shows that the Company did more than merely acquiesce or fail to act—it encouraged the activity. After the first act of violence in the plant (the assault of Fay Madden), the Vice President of the parent company spoke to all the employees. Instead of condemning the violence, he stated that the ILG "does not belong here" and that he was "gratified by the loyalty of most of you." These remarks could only indicate that the Company approved of the acts of its employees in ridding the plant of ILG sympathizers. After each incident, the evicted employees were the ones who were criticized and sent home by the plant manager and eventually "laid off" on a permanent basis. The supervisors mysteriously disappeared from the scene a few minutes before an incident or stood by without making any attempt to halt or prevent the violence. Although Plant Manager Byrd claimed he had thoroughly investigated the incidents, five of the six employees supposedly interrogated by Byrd testified that they had neither been questioned nor reprimanded. Indeed, two of the chief instigators of the violence were given promotions even though the Company had been informed of their part in the expulsions. Thus it is evident that the Company not only failed to take adequate steps to prevent violence to supporters of the ILG but also that it actively encouraged such actions. For these reasons, the Board's finding was clearly proper. *NLRB* v. *Newton*, 5th Cir. 1954, 214 F.2d 472, 475; *NLRB* v. *Fred P. Weissman Co.*, 6th Cir. 1948, 170 F.2d 952, 954, cert. denied, 336 U. S. 972, 69 S. Ct. 942, 93 L.Ed. 1142; *NLRB* v. *Goodyear Tire & Rubber Co.*, 5th Cir. 1942, 129 F.2d 661, 664, cert. de-

nied, 319 U. S. 776, 63 S. Ct. 1026, 87 L.Ed. 1723,[8] *NLRB* v. *Hudson Motor Car Co.*, 6th Cir. 1942, 128 F.2d 528, 533.

No Solicitation Rule

The Board concluded that there was "no justification" for the modification of the solicitation rule to prohibit solicitation at any time on Company property. The original rule had only forbidden solicitation on Company time during working hours and had been in effect several months prior to the purchase of the Brewton plant by the Company. The change was promulgated at a time when ILG activity in signing up employees was "at its height."[9]

In *Republic Aviation Corp.* v. *NLRB*, 1945, 324 U.S. 793, 803, 65 S.Ct. 982, 89 L. Ed. 1372, ..., the Supreme Court approved the following statement of the test to be applied to such solicitation rules:

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8. In *Goodyear Tire*, this Court dealt with a similar situation and stated:

"[I]t is not denied by respondent, indeed it puts forward as a defense, that the 12 were evicted because of their membership in or sympathy with United, as a result of the demands of other employees that they be evicted. Difficult as an employer's position may be under such circumstances, its duty is plain. The statute prohibits discrimination against persons on account of their membership in or activities on behalf of unions. It specifically prohibits the discharge of employees for the purpose and with the effect of discouraging membership in a union. On the admitted facts respondent cannot escape responsibility for these evictions and discharges . . . . [T]hese discharges were the result of the feeling against United then rampant in the plant and community, and, to say the least of it, yielded to by respondent. It was its duty to resist such violent domination of its right and power to employ whether manifested by or toward United. It cannot escape responsibility for the consequences of its failure to discharge that duty."

9. Nine of the ten ILG adherents involved in this case signed ILG cards between May 7 and May 21. The rule was changed on May 22.

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> "Working time is for work. It is therefore within the province of an employer to promulgate and enforce a rule prohibiting union solicitation during working hours. Such a rule must be presumed to be valid in the absence of evidence that it was adopted for a discriminatory purpose. It is no less true that time outside working hours, whether before or after work, or during luncheon or rest periods, is an employee's time to use as he wishes without unreasonable restraint, although the employee is on company property. *It is therefore not within the province of an employer to promulgate and enforce a rule prohibiting union solicitation by an employee outside of working hours, although on company property. Such a rule must be presumed to be an unreasonable impediment* to self-organization and therefore discriminatory *in the absence of evidence that special circumstances make the rule necessary in order to maintain production or discipline.* (Emphasis added.)

See *NLRB* v. *United Aircraft Corp., Pratt & Whitney Aircraft Division,* 2d Cir. 1963, 324 F.2d 128; *NLRB* v. *Linda Jo Shoe Co.,* 5th Cir. 1962, 307 F.2d 355.

The Company attempts to establish the "special circumstances" necessary to justify the rule by pointing to the "tense plant situation" and the violent incidents which followed the promulgation of the rule. Since we have concluded that the Company played a major role in fostering and encouraging this atmosphere of tension and the resulting violence, we cannot allow the Company to utilize the results of its own unlawful acts to justify this restriction on union activity. The background of the Company's anti-ILG sentiment and the timing of the rule's modification at the height of ILG activity indicate

that the Company had motives other than maintenance of production or discipline. This conclusion is further strengthened by the complete failure of the Company to utilize its already established methods for insuring production and discipline. Thus the Company has failed to sustain its burden of justifying the rule in the face of its presumed invalidity.

Prohibition of the Wearing of ILG Pins

Similar considerations apply to the Company's refusal to allow employees to wear ILG pins on Company premises. "[T]he right of employees to wear union insignia at work has long been recognized as a reasonable and legitimate form of union activity . . ." under Section 7 of the Act. *Republic Aviation Corp.* v. *NLRB, supra,* 324 U. S. at 802 n.7, 65 S. Ct. at 987, 89 L. Ed. at . . . .; see *NLRB* v. *Mayrath Co.,* 7th Cir. 1963, 319 F.2d 424, 426; *NLRB* v. *Floridan Hotel,* 5th Cir. 1963, 318 F.2d 545, 547. The right, however, may be restricted in the interests of insuring "efficient and orderly operation" of a company's business. *Floridan Hotel, supra.* If the Company in the instant case had taken a neutral position in the inter-union controversy and had taken reasonable steps to enforce its pre-existing rules for maintaining production and discipline, its action in prohibiting the wearing of union pins may have been justified. But, in the context of events as noted above, the Board properly found the prohibition and the discharge of Lynn Estes for wearing a pin to be violations of the Act.

Appendix A

Discharge of Fay Madden

Fay Madden was hired on March 29 as a presser, mainly on the recommendation of Byrd's friend, the Mayor of Brewton, even though she had failed the employee aptitude test. One week later (April 5) she received a warning notice for "lack of efficiency." On May 15 she joined the UGW and on May 17 the ILG. About a day later, Floorlady Cain asked her if she did not "have enough sense not to join another union" and told her that if the "other union came in" . . . . "a lot of youngsters would go hungry." Madden received a second notice on May 21, more than six weeks after the first notice, for failure to make production and was warned that unless she made production by May 23 she would receive her third slip and be fired. UGW shop steward Jessie Wilson, who was present in Byrd's office when Madden was given the second slip, later told Madden that the Company would take the slip back if she withdrew from the ILG. That afternoon Floorlady Cain asked Madden if she was still in the ILG. When Madden replied that she understood union matters were not to be discussed on company time, Cain stated that she thought Madden had to work, but perhaps she did not. On May 23, Madden wore an ILG pin to work. After pins were twice ripped off her dress, Byrd sent her home. The next day Byrd discharged Lynn Estes for wearing an ILG pin and Madden for failure to make production.

> "We have repeatedly held that 'if the discharge is because of union activity it is a violation of the Act even though a valid ground for dismissal might exist.' . . . [W]here 'there are two grounds for

> discharge, one proper and the other unlawful, and the evidence as a whole would make the inferences as to which was the motivating cause reasonably equal, the conclusion reached by the Board should be sustained.' N.L.R.B. v. Hudson Pulp & Paper Corp., 273 F.2d 660, 666 (5th Cir. 1960); N.L.R.B. v. The Newton Co., 236 F.2d 438, 445 (5th Cir. 1956); N.L.R.B. v. Fox Mfg. Co., 238 F.2d 211, 215 (5th Cir. 1956)."

NLRB v. *Longhorn Transfer Serv., Inc.*, 5th Cir. 1965, 346 F.2d 1003, 1006. From the long delay between the first and second notices, the nature of Madden's activity immediately preceding the second and third notices, the comments of supervisory personnel and the timing of the discharge during a period of intense union activity,[10] the Board concluded that the discharge was motivated by Madden's union activity. Since this finding is based upon a reasonable inference and is amply supported by evidence in the record, we sustain the Board's finding.

The Company strenuously asserts that the Hearing Examiner was biased; however, the Company fails to present sufficient evidence to support this contention.

The order of the Board is ENFORCED.

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10. See NLRB *v.* Soft Water Laundry, Inc., 5th Cir. 1965, 346 F.2d 930, 935: "The timing of the discharge is also pertinent evidence of motivation."

APPENDIX B

Excerpts from National Labor Relations Act

"Rights of Employees

"SEC. 7. Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

"Unfair Labor Practices

"SEC. 8. (a) It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization; * * *"

* * * * *

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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 427

BREWTON FASHIONS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–20a) is reported at 361 F. 2d 8. The Board's decision and order (R. 250–260, 117–203)[1] are reported at 145 NLRB 99.

JURISDICTION

The judgment of the court of appeals was entered on May 10, 1966 (Pet. App. 2a). The petition for a writ of certiorari was filed on August 8, 1966. The

[1] "R." refers to the volume of formal papers printed for use of the court below. "J.A." refers to the portions of the testimony and exhibits printed as a joint appendix to the parties' briefs.

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant portions of the National Labor Relations Act (49 Stat. 449, as amended, 29 U.S.C. 151, *et seq.*), are set forth in Appendix B to the petition.

QUESTION PRESENTED

Whether substantial evidence supports the Board's finding that the employer violated Section 8(a)(3) and (1) of the National Labor Relations Act by sanctioning the forcible expulsion of a group of employees from his plant because of their support of a union he disfavored.

STATEMENT

A. INTRODUCTION

Petitioner ("the Company") is a subsidiary of Judy Bond, Inc., a seller of ladies' blouses. Prior to the Company's formation, practically all Judy Bond blouses had been made by contractors in New York, which were organized by the International Ladies Garment Workers' Union ("ILG") under a master contract with the National Association of Blouse Manufacturers. In the Fall of 1961, Judy Bond resigned from the Association and began negotiating with the ILG separately, but the parties were unable to reach an agreement (R. 120–121; J.A. 374–375, 378–379). In December 1961, Judy Bond formed the Company, which, one month later, purchased the Brewton Manufacturing Company in Alabama and

commenced to manufacture blouses for Judy Bond with Brewton's existing equipment, management and employees (R. 121; J.A. 351). On January 10 and 11, 1962, the Company negotiated a new contract with the United Garment Workers of America, Local Union 422 ("UGW"), which had represented Brewton's employees since 1957 (R. 121–122; J.A. 353, 355–359).

The ILG regarded the Company as a "runaway shop" and began an organizational campaign at its plant and warehouse during the latter part of January 1962 (R. 131–133; J.A. 390–392, 611). Between February and May, several employees made known their preference for the ILG rather than the UGW. In response to this activity, the Company interrogated the ILG adherents concerning their union activities and threatened them with reprisal, promulgated and enforced no-solicitation rules which discriminated against the ILG, and banned the wearing of ILG buttons. The Board found that, by this conduct, the Company interfered with its employees' organizational rights, in violation of Section 8(a)(1) of the Act (R. 178–180, 254–255). The Board further found that the Company had assisted the UGW, in violation of Section 8(a)(2) of the Act (R. 183–184, 255–256). The court of appeals sustained these findings (Pet. App. 6a–9a, 16a–18a), and they are not challenged here. The only challenge is to the Board's further finding that the Company, in violation of Section 8(a)(3) and (1) of the Act, laid off or discharged ten employees because of their adherence to the ILG.

B. THE LAYOFFS AND DISCHARGES

On May 23, 1962, Fay Madden and Lynn Estes reported to work wearing ILG buttons. While several women employees held Madden, another employee removed the pin and threw it away (R. 142–143; J.A. 269, 417, 458–459). When Madden returned wearing another pin the employees again forcibly removed it, tearing Madden's dress in the process (R. 143, 253, n. 2; J.A. 270, 96, 191–192, 218, 224–225, 333, 418–419, 458–459, 629–630). Foreman Eskridge stood nearby watching the disturbance, but did nothing (R. 143; J.A. 192), and Floorlady Gandy[2] ran into a foreman's office and exclaimed "They've got the pin off her!" Gandy added that she "would stomp [Madden] in the floor!" and that she hoped "they would run her butt out!" (R. 143; J.A. 192, 269, 333). Plant Manager Byrd then arrived, reprimanded Madden for wearing the button in the plant, and sent her home until the other women "cooled off" (R. 143–144; J.A. 271, 630–632). Later that morning, Byrd called Estes into his office and told him that he would be discharged if he wore an ILG pin in the plant again (R. 144; J.A. 253). Several hours later, Company Vice-President Rothenberg, speaking over the plant's public address system, told the employees that "[t]he I.L.G.W.U. does not belong here and we will not tolerate any action which might create dis-

[2] The court below sustained the Board's finding (R. 126–128) that Foreman Eskridge and the floorladies were supervisors within the meaning of Section 2(11) of the Act, 29 U.S.C. 152(11) (Pet. App. 6a).

sentions and disturbances in the plant. We are very gratified by the loyalty most of you have shown to the Company * * *" (R. 144–145, 253; J.A. 362, 720).

Shortly after 1 p.m. that same day, a group of male employees forcibly ejected Estes from the plant for having worn an ILG pin (R. 145–146; J.A. 98–99, 120, 148, 193–194, 225–226, 253–254, 334, 461–462, 508–509). At the same time, a number of female employees, including Mary Braddick, forced ILG adherents Jones, West, Bell, and Chavers to leave the plant (R. 146; J.A. 99, 149–150, 194, 226–227, 334, 421, 470–471). Just before these evictions, Floorlady Gandy told two other floorladies to come with her to Foreman Williams' office, and during the struggling, Gandy watched from the office door with apparent glee (R. 147; J.A. 307).

The four evicted female employees complained to Plant Manager Byrd about their treatment (R. 147; J.A. 100–101, 151, 195, 227, 632–634). When West asked whether Byrd could make the plant workers behave so that the four could go back to work, Byrd replied, "No, I can't handle them * * * that's what you call a mob" (R. 147–148; J.A. 100, 195). Bell then asked whether she could return to work the following day, and Byrd answered that it would be at her own risk because he could not give her "any kind of protection in the plant" (R. 148; J.A. 100–101). He told the group that they should stay at home for their own protection, and that, if they would call from time to time, he would advise them when to return (R. 148; J.A. 101, 122, 634). The four women

left the plant and reported the incident to the local sheriff (R. 148; J.A. 123, 166–167, 218). On May 24, Byrd advised the group not to come to work for a few more days (R. 148; J.A. 101).

The next morning, May 25, the five evicted employees and Madden went to Byrd's office seeking to return to work. Byrd told them that they should lay off a few days longer as the women were still upset and he could offer them "no protection unless there is violence in the mill" (R. 148; J.A. 101–102, 196–197, 152–153). Byrd assured four of the employees that they still had jobs, but he discharged Estes and Madden, the former allegedly for wearing an ILG pin on May 23 and the latter allegedly for failing to make her production quota (R. 148–149, 18, 256, n. 5; J.A. 255–256, 272–273, 624).

On the morning of May 31, Chavers, Bell, Jones, and West reported for work at Byrd's office in accordance with his instructions (R. 149–150; J.A. 103–104, 197; 641). Byrd assigned Jones and Chavers to their old jobs but assigned West and Bell to operate sewing machines, so as to reduce their contact with other workers (J.A. 104, 229, 642). He cautioned all four that he wanted no discussion of unions in the plant[3] (R. 150; J.A. 105, 198, 154, 229, 641). Foreman Esk-

[3] On the previous day, Byrd had posted the following notice (R. 150; J.A. 641–642, 716):

> TO ALL EMPLOYEES:
>
> This is to refresh your memory of a previous notice posted on the bulletin board and to advise you that under no conditions are we to have any violence in the plant on the company property.

ridge attempted to escort Jones and Chavers to their work stations, but a group of about 25 women forced them through the door leading into the lobby (R. 151; J.A. 155–156, 230). Eskridge pulled open the door to Byrd's office and cried out, "Byrd, they are running [Jones] and [Chavers] out again, and Mary Alice Braddick started every darn bit of it" (R. 151; J.A. 105, 199, 643). Byrd sent the four ILG supporters home, and the other employees returned to work (R. 151; J.A. 643). Mary Alice Braddick was not reprimanded; in June, she was promoted to floorlady (R. 151, n. 54; J.A. 446).

On June 4, each of the four women employees wrote Byrd protesting that he had permitted the other employees to evict them from the plant; they also inquired when they could return to work and whether they would receive protection (R. 152; J.A. 717, 722, 724, 727). Three weeks later, on June 25, Byrd replied that they had "intentionally and wilfully provoked" the demonstrations against them and that, if they wished to work in the plant, they must "avoid the inciting of any further demonstrations" (R. 152–153; J.A. 645, 718–719, 725–726, 728). The four women returned to work on July 9, and there were no incidents on that day or the next (R. 154–155; J.A. 110). On July 11, West heard a fellow employee tell Floorlady Smith that "they were fixing to run us out again" (R. 155; J.A. 111). Floorlady Smith walked off, and 15 or 20 employees removed West and the three other newly returned employees from their work stations (R. 155–156;

J.A. 111, 160, 203, 233, 491–492). Floorladies Smith and Braddick watched the eviction but did nothing (R. 156; J.A. 204). Foreman Eskridge took Bell, Jones and Chavers to Byrd's office and told Byrd that they had not "done anything to cause the difficulty" (R. 156; J.A. 204, 161). Byrd replied, "I know they weren't causing any trouble," and asked the names of those who were in the offending group (R. 156; J.A. 161, 204–205). Byrd sent the ILG supporters home, promising that he would call them when he thought it advisable for them to return to work (R. 156; J.A. 161, 205, 235). He did not thereafter recall any of them (R. 156; J.A. 111–112, 162, 205).

On August 3, four more employees came to work wearing ILG pins (R. 157; J.A. 286, 307, 320, 337). Shortly thereafter, Byrd told them that wearing the pins could result in violence and that they must either take the pins off or go on layoff until sentiment in the plant had changed (R. 158; J.A. 730, 286–287). The four employees left the plant rather than remove their pins, but returned to work on August 16, without the pins. On that date, they were evicted from the plant by a group of employees (R. 160; J.A. 289–290, 322, 340, 428, 309). During the eviction, Floorladies Gandy, Smith, and Boddiford stood by watching and "snickering" (R. 160; J.A. 309–310, 326, 341).

The evicted workers reported what had happened to Byrd, who told them that their presence in the plant was causing the disturbance (R. 160; J.A. 310,

324–325) and that "[t]here wasn't anything he could do about it." He advised that, for their own protection, they stay home until the situation in the plant permitted their return (R. 161; J.A. 291, 341–342). One of the four evictees called Byrd early in November and asked when she might return, but Byrd said he had no idea (R. 161; J.A. 342). Byrd did not call the others (R. 161; J.A. 291, 311, 326).

No employees were punished for taking part in the evictions, although the names of those responsible were given to Byrd by the ILG adherents (R. 147, 156, 160; J.A. 100–101, 195, 161, 325), by supervisory personnel (R. 151; J.A. 105), and by participating employees (R. 162–163; J.A. 433–444, 438–439). Nor did Byrd interrogate the employees whose participation in the evictions was called to his attention (R. 163; J.A. 549–570; 399, 495, 511, 530–532).

C. THE DECISIONS BELOW

The Board concluded that the Company, by failing to take reasonable measures to prevent that action, had "ratified and condoned the forcible ejection of the ILG supporters, and had thus in effect caused them to be laid off or discharged on account of their ILG activity, in violation of Section 8(a)(3) and (1) of the Act" (R. 256–257). The Board ordered the Company to cease and desist from "failing to take all reasonable measures necessary to prevent supporters of [UGW] from evicting employees from its * * * plant because of their membership in, or support and

assistance to" another labor organization, and from discouraging membership in ILG by discriminatorily discharging or laying off any employee (R. 191). Affirmatively, the order requires the Company to reinstate the employees discriminated against with back pay (R. 192, 195). The court of appeals enforced the Board's order in full, stating that the evidence showed that the Company not only acquiesced in the evictions, but encouraged them (Pet. App. 15a).

ARGUMENT

The broad question which petitioner seeks to raise here (see Pet. 2) is not actually presented by this case. Whatever may be the obligation of an employer who is an innocent bystander to anti-union activity instigated by his employees, it is clear that an employer violates the Act where, as here, he sanctions and actively supports the use of violence as a means of thwarting union activities. *National Labor Relations Board* v. *Newton*, 214 F. 2d 472, 475 (C.A. 5); *National Labor Relations Board* v. *Fred P. Weissman Co.*, 170 F. 2d 952, 954 (C.A. 6), certiorari denied, 336 U.S. 972; *National Labor Relations Board* v. *Goodyear Tire & Rubber Co.*, 129 F. 2d 661, 664 (C.A. 5), certiorari granted, 317 U.S. 622, writ dismissed, 319 U.S. 776; *National Labor Relations Board* v. *Hudson Motor Car Co.*, 128 F. 2d 528, 533 (C.A. 6). Thus, the issue raised by the petition is, essentially, whether substantial evidence supports the Board's finding that the Company sanctioned the forcible ejections from its plant. The

court of appeals upheld the Board's finding, and there is no occasion for further review of this evidentiary issue. *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474, 490–491. In any event, in the light of the Company's widespread acts of restraint and coercion against ILG adherents (see Statement, *supra,* p. 3) and the course of conduct which it engaged in when the disturbances occurred (see the opinion of the court below, Pet. App. 15a), it is evident, as the court of appeals concluded, "that the Company not only failed to take adequate steps to prevent violence to supporters of the ILG but also that it actively encouraged such actions" (*ibid.*).[4]

Contrary to petitioner (Pet. 17–24), the decision below is not in conflict with any other decision. Most of the cases cited by petitioner involved employee animosities unrelated to union activities or provoked by unprotected conduct. The disturbances involved in *National Labor Relations Board* v. *P. R. Mallory & Co.,* 237 F. 2d 437 (C.A. 7), and *Porto Mills, Inc.,* 149 NLRB 1454, were related to union activities. In those cases, however, the court and the Board, respectively, found that—unlike the present situation—

[4] In this situation, it cannot properly be contended that the requirements of the Board's order are insufficiently clear (see Pet. 13–15). It is evident that the order requires the Company to cease its assistance and encouragement to those engaging in violence and to take appropriate measures to prevent such violence from recurring.

the employer had neither encouraged nor condoned the discriminatory conduct of the employees.[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1966.

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[5] In *Mallory*, the Court found that the company had no knowledge that the employee in question was being ejected for non-membership in the union, and "it, like the union, gave no assistance either directly or indirectly to the group of employees who for some reason or other were hostile to her" (237 F. 2d at 446). In *Porto Mills*, the Board found that the company had refused to accede to the demand of the anti-union employees that the employee in question be discharged; rather he was discharged because of his refusal to cooperate in the company's efforts to resolve the dispute—*i.e.*, by taking a week off with pay until things "calmed down" (149 NLRB at 1455).

U.S. GOVERNMENT PRINTING OFFICE: 1966

Office-Supreme Court, U.S.
FILED
SEP 20 1966
JOHN F. DAVIS, CLERK

Supreme Court of the United States

OCTOBER TERM, 1966

No. 427

BREWTON FASHIONS, INC.,
Petitioner,
against
NATIONAL LABOR RELATIONS BOARD,
Respondent.

REPLY BRIEF OF PETITIONER IN SUPPORT OF ITS PETITION FOR A WRIT OF CERTIORARI.

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REPLY BRIEF OF PETITIONER IN SUPPORT OF ITS PETITION FOR A WRIT OF CERTIORARI.

This brief will discuss the various points raised by the reply brief of respondent NATIONAL LABOR RELATIONS BOARD.

ARGUMENT

POINT I.

The Board's discussion of the scope of the applicable order.

In its reply brief the Board contends that its order is sufficiently clear to provide guidance on which the Employer can base its future conduct. To prove this point it states (at n.4 p. 11) what it considers to be the obligations imposed by that order—it "requires the Company to cease its insistence and encouragement to those engaging

in violence and to take appropriate measures to prevent such violence from recurring." We submit that the Board's own characterization of its order proves our contention. In other words, the Board is saying that an order punishable by the sanction of contempt of court is sufficiently clear if it requires a party to take "appropriate measures" to prevent violence. Nowhere either in the opaque order or the opaque characterization is there any guidance as to what measures are "appropriate." If in the future violence recurs at the Brewton plant, the Employer would be faced with the problem of trying to guess what measures are "appropriate", upon the penalty of being adjudged in contempt of court if it is wrong.

The difficulty of interpreting the Board's order is heightened by the conflicting case authority. For example, in *Cross Co.*, 143 NLRB 88 (1963) the Labor Board was satisfied with certain measures taken by that employer to prevent violence in a similar situation. The measures in the *Cross* case in large part parallel the measures taken by the Employer here. But it would be impossible under the present order to determine whether or not the Employer must go beyond the measures held satisfactory in *Cross*. It is equally impossible to determine whether the Employer is entitled to take account of the normal considerations of running a business and maintaining uninterrupted production in deciding what would be an "appropriate" measure.

What places this Employer in such a dilemma is the difficulty of ever knowing what steps should be taken to prevent violence. Today many well-intentioned governors and mayors in this country are faced with similar problems of preventing violence with no indication of which measures will work and which will not. Sometimes

the efforts used are successful in preventing violence, other times they are not. But it would be most unfair to impose a vague and general requirement enforced by contempt of court proceedings to take all "appropriate" steps to prevent future violence. It is obvious that the criteria in such an instance must be better articulated.

Here we are faced with a similar problem. The Board and the Fifth Circuit have recognized the tense feelings in the Brewton plant, but now the Employer is told to hold these feelings in check at the risk of being held in contempt of court. The difficulty of living up to such a standard requires at the very least a complete discussion of this subject by this Court so that the Employer and all others similarly situated will know precisely what their legal obligations are.

POINT II.

The Board's discussion of the law.

The Board's discussion of the holdings of various cases are unsupported by the facts of those cases. In particular, it ignores the unprecedented nature of the decision herein and the authorities contrary to it. Thus it cites four cases as supporting the opinion of the Fifth Circuit, but the examination of these four cases indicates substantially different facts from those here.

In *NLRB* v. *Newton,* 214 F. 2d 472 (5th Cir., 1954) one of the controversial employees was severely beaten up by other employees in the owner's presence while he smiled and applauded. While suffering from severe injuries and in need of medical attention, she was ordered by the plant superintendent either to get back to work or leave the plant. This impossible ultimatum has no analog in this case.

Likewise, in *NLRB* v. *Fred P. Weissman Co.*, 170 F. 2d 952 (6th Cir., 1948), *cert. denied,* 336 U. S. 972 (1949), another case relied on by the Board, it appeared that pro-union employee was evicted by a mob *headed by a supervisor.* Thereafter, after a number of the employees had been prevented from working by groups of anti-union employees, the employer discharged them all upon the pretext that they had voluntarily quit work. This contrasts with the present situation where the Employer tried unsuccessfully on three different occasions to return the evicted employees to their jobs and took numerous other steps to try to get them accepted as co-workers.

NLRB v. *Goodyear Tire and Rubber Co.*, 129 F. 2d 661 (5th Cir., 1942), involved a unique fact situation where the employees involved had been severely beaten in the plant by a small group of fellow employees whose identities were well known, in the presence of approving supervisors. As contrasted with the situation here, that case involved not mass action by virtually all employees, but action by small vigilante groups in a large plant.

In *NLRB* v. *Hudson Motor Car Co.*, 128 F. 2d 528 (6th Cir., 1942), there is no indication that the Employer made any attempt whatsoever to prevent the violence which disrupted its plant. Here it is uncontroverted that the Employer did attempt in many ways to prevent violence.

Hence this is the only case where an employer is found guilty of an unfair labor practice not because he did not act to prevent violence or even actually participated in it, but rather because while the Employer did act, the Board enjoying the benefit of hindsight is dissatisfied with the measures taken. This drastic conclusion finds no support in the authorities.

The Board's discussion of the cases cited in the petition likewise ignores the unprecedented nature of this case. Its listing of cases where the violence was related

to union activities ignores *NLRB* v. *Edinburg Citrus Association,* 147 F. 2d 353 (5th Cir., 1945). It would distinguish ***NLRB* v. *P. R. Mallory & Co.*, 237 F. 2d 437** (7th Cir., 1956) by the fact that the employer therein had no provable animosity toward the union. In other words, the Board would have the law be that once there is friction between an employer and a union, the employer is, by that fact alone, responsible for any acts committed against that union or its adherents and presumably the normal considerations of peacefully operating a plant no longer apply to that employer. The language of *Mallory* quoted at pp. 17-18 of the petition vitiates the contention that an employer is ever the insurer of its employees against possible violence from their fellow employees.

That contention is further discredited by *Porto Mills, Inc.,* 149 NLRB 1454 (1964). It will be recalled that in that case the Board found, as a matter of fact, that the employer had both anti-union animus and knowledge that the violence directed against the employee in that case was based upon her protected activities. Nevertheless the Board there did not find the employer responsible for the violence. Accordingly, we reiterate our statement that the decision of the Fifth Circuit herein is at variance with that of the Seventh Circuit in *Mallory* and the Board itself in *Porto Mills.*

The Board in its brief takes the same view of the case that the Fifth Circuit did—that this is a simple substantial evidence case and there need not be detailed discussion of the applicable law. In that way the Board contends the broad question formulated by the Petition can be avoided. It is precisely the failure to discuss any of the broad issues raised herein that makes the Fifth Circuit opinion so unsatisfying. That court was asked to balance the employees' rights protected by the National Labor Relations Act with the Employer's right to peace-

fully manage its plant. Instead the court refused to discuss that issue clearly presented to it. Its conclusion that there is substantial evidence cannot be meaningful without a discussion of the bounds of the obligation the Company is supposed to have violated. In a difficult situation with no clear precedent for its action, the Fifth Circuit finessed the problem of deciding what the law is by saying the Employer violated it. This leaves in confusion the question of when an employer is responsible for the violence of his employees and whether other unfair labor practices increase an employer's affirmative obligations in this regard. The only way to dissipate the confusion and advise the Employer and others, faced with this problem, of their obligations under the law is for this Court to face the issues of necessity raised by this case and grant the petition herein.

CONCLUSION

For all the reasons stated in the petition herein and in this brief the petition for a writ of certiorari should be granted.

Respectfully submitted,

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